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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 646

MANUEL SANCHEZ GALLEGOS,
JOHN FRANKLIN TAYLOR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgments of the United States District Court for the Southern District of California, Central Division, convicting the petitioners of a violation of the Universal Military Training and Service Act and sentencing them to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals is not yet reported. It is in the Transcript of Record, Vol. 2. It is also Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on November 6, 1961 [R. Vol. 2, also see Appendix B to this petition].

A 30 day extension of time was granted by the Court to file this petition. This petition for writ of certiorari is filed within the required thirty days' time, as extended.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district court has jurisdiction under 18 U.S.C., § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED.

I.

Were petitioners denied due process when they were denied the physical reexamination given registrants when more than 120 days elapsed between the order to report and the prior examination? The question was originally raised by motions for judgment of acquittal and then by motions for new trial.

II.

Were petitioners denied due process upon their reprocessing by the agency when they were never given a phys-

ical examination during any of the several reprocessings each had? The question was raised by the aforesaid motions.

III.

Is evaluation of newly discovered evidence, as the basis of a motion for a new trial, subject to the exercise of the trial judge's discretion where, as here, it is urged that said evidence supports a claimed denial of due process present in the petitioner's administrative agency's processing? The question is explicitly raised by the Court of Appeals' opinion.

4. STATUTES AND REGULATIONS INVOLVED.

Amendment V to the Constitution, due process clause is involved.

Section 1 (c) of the Universal Military Training and Service Act is involved.

Sections 1622.1 (b) and (d), 1623.3, 1628.10, 1631.7 and 1660.20 (a) are involved.

All above sections of the Act and of the Regulations are set forth in Reasons for Granting Writ.

5. STATEMENT OF THE CASES.

Each appellant was convicted of a violation of the Universal Military Training and Service Act. Taylor and Gallegos were each given five years by District Judge Tolin.

Each appealed to the Court of Appeals for the Ninth Circuit and each conviction was affirmed (*Johnson et al.* v.

United States, 9th Cir., 1961, 285 F.2d 700. *Taylor* v. *United States*, 9th Cir., 1961, 285 F.2d 703).

Each thereafter timely filed a motion in the district court for a new trial on the ground of newly discovered evidence, each using the same, single fact relating to a point, in common, in the original appeals, namely, the physical examination point. The motions were denied, timely notices of appeal were filed and each appellant was again admitted to bail pending determination of his appeal, on nominal bond.

6. REASONS FOR GRANTING THE WRIT.

I.

Petitioners were not accorded the same physical examination opportunities given all other registrants despite the commands of the Act and of the agency regulations.

It is of importance to the nation that the administrative agency dealing with the manpower portion of our national defense effort handle the vast numbers of young men it processes "[i]n accordance with a system of selection that is fair and just." [Act, § 1(c)]. The continued existence of the Selective Service System as a smooth and effective manpower-producing machine depends on public confidence. Whatever materially erodes confidence in its fairness of operation is subversive to the national safety.

The decision of the Court of Appeals, based on the philosophy that petitioners (classified in Class I-O) did not "need" the same physical examination given others because they are subjected to "different stresses", should not be permitted to stand, in that it is contrary to the express provisions of the regulations, breaches the wall of fair and equal treatment and discredits the Act.

It is public knowledge that a high proportion of selectees do not become inductees because they do not meet the current standards. President John F. Kennedy, addressing the National Football Foundation on December 5, 1961, stated that it was necessary to call up seven men to get two. Comparable statistics and statements from Selective Service System publications were presented in the briefing to the Court of Appeals. It is evident that depriving Taylor and Gallegos of physical examinations was a prejudicial act for Taylor had not been examined for five years and nine months before given the Order and Gallegos four years, four months.

The physical examination of registrants is governed by the regulations, 32 C.F.R., § 1623. Subsection 1623.3 says:

"PHYSICAL EXAMINATION.

"Physical examination of registrants classified in Class I-A, Class I-A-O, or Class I-O shall be accomplished under the provisions of part 1628, of this chapter."

Then see Subsection 1628.10. It has two significant words: "every" with respect to registrants, thus showing that it was intended that every registrant was to be examined, as provided; and "shall" was used, making the procedure mandatory.

"ARMED FORCES PHYSICAL EXAMINATION.

"1628.10 Who Will Be Examined—

Every registrant, before he is ordered to report for induction, or *ordered to perform civilian work* contributing to the maintenance of the national health, safety, or interest *shall be* given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant